Supreme Court, U.S.
FILED
JUN 17 1999
CLERK

NO. 98-1856

IN THE SUPREME COURT OF THE UNITED STATES
October 1998 Term

LEILA JEANNE HILL *et al.*,

Petitioners,

vs.

THE STATE OF COLORADO *et al.*,

Respondents.

On Petition for Writ of Certiorari to
The Supreme Court of the State of Colorado

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

KEN SALAZAR
Attorney General
MICHAEL E. McLACHLAN
Solicitor General
FELICITY HANNAY
Deputy Attorney General
CAROL D. ANGEL*
Senior Assistant Attorney General
Natural Resources and Environment Section
Attorneys for Ken Salazar and State of Colorado
1525 Sherman Street, 5th Fl.
Denver, Colorado 80203
Telephone: (303) 866-5016
FAX: (303) 866-3558
Counsel of Record

ROGER W. NOONAN
MAUREEN HERR JURAN
GORSUCH KIRGIS LLP
1515 Arapahoe Street
Suite 1000
Denver, Colorado 80202
Telephone: (303) 376-5000
Attorneys for City of Lakewood

36pp

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

QUESTION PRESENTED FOR REVIEW

Was the Colorado Supreme Court correct in holding that Colo. Rev. Stat. § 18-9-122(3) (1998), which restricts aggressive, threateningly close approaches by demonstrators within 100 feet of the entrance of health care facilities, is constitutional as a reasonable, content-neutral time, place or manner statutory regulation of speech?

TABLE OF CONTENTS

PAGE

QUESTION PRESENTED FOR REVIEW i

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 4

I. THE COLORADO SUPREME COURT'S DECISION IS IN ACCORD WITH THE DECISIONS OF THIS COURT. 5

A. The Colorado Supreme Court Correctly Applied The Well-Settled Test To Determine The Constitutionality Of Statutes Imposing Time, Place Or Manner Restrictions. 5

B. The Decision Below Is Consistent With *Schenck* And *Madsen*. 10

C. The Statute Is Content-Neutral. 18

D. The Decision Below Merely Applies A Long-Settled Definition Of Prior Restraint. 22

II. THE STATUTE IS CONSISTENT WITH DECISIONS OF OTHER STATE COURTS OF LAST RESORT AND FEDERAL CIRCUIT COURTS. 23

A. The Ninth Circuit Evaluated A City Ordinance That Operated Differently Than The Statute Here 24

TABLE OF CONTENTS

PAGE

B. The Eighth Circuit And The North Dakota Supreme Court Evaluated Provisions With No Similarity To The Statute At Issue Here. 25

III. THE DECISION BELOW PRESENTS NO NEW OR IMPORTANT QUESTIONS OF CONSTITUTIONAL LAW. 26

CONCLUSION 29

TABLE OF AUTHORITIES

PAGE

CASES

Bering v. SHARE, 721 P.2d 918 (Wash. 1986), *cert. dismissed*, 479 U.S. 1050 (1987) 26

Boos v. Barry, 485 U.S. 312 (1988) 19, 24

Burson v. Freeman, 504 U.S. 191 (1992) 19

Carey v. Brown, 447 U.S. 455 (1980) 19, 29

Carroll v. President and Comm'rs of Princess Anne, 393 U.S. 175 (1968) 7

City of Lakewood v. Plain Dealer Publishing Co., 486 U.S. 750 (1988) 21

Clark v. Community for Creative Non-Violence, 468 U.S. 288 (1984) 6

Cox v. Louisiana, 379 U.S. 536 (1965) 21, 27

Fargo Women's Health Organization, Inc. v. Lambs of Christ, 488 N.W.2d 401 (N.D. 1992) 23, 24, 25

Forsyth County v. Nationalist Movement, 505 U.S. 123 (1992) 19

Freedman v. Maryland, 380 U.S. 51 (1965) 21

Frisby v. Schultz, 487 U.S. 474 (1988) 6, 28

FW/PBS, Inc. v. City of Dallas, 493 U.S. 215 (1990) 21

Hirsh v. City of Atlanta, 401 S.E.2d 530 (Ga.), *cert. denied*, 501 U.S. 1221, 502 U.S. 818 (1991) 25

ISKCON v. Lee, 505 U.S. 672 (1992) 22

Kovacs v. Cooper, 336 U.S. 77 (1949) 27

PAGE

Madsen v. Women's Health Center, Inc., 512 U.S. 753 (1994) 4, 6, 7, 9, 15, 16, 17, 18, 20, 21, 27, 28

Perry Education Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983) 6

Planned Parenthood Shasta-Diablo, Inc. v. Williams, 898 P.2d 402 (Cal. 1995), *cert. denied*, 520 U.S. 1133 (1997) 25

Police Department of Chicago v. Mosley, 408 U.S. 92 (1972) 19

Portland Feminist Women's Health Center v. Advocates for Life, Inc., 859 F.2d 681 (9th Cir. 1988) 25

R.A.V. v. City of St. Paul, 505 U.S. 377 (1992) 19

Riley v. National Federation of the Blind, Inc. 487 U.S. 781 (1988) 21

Rowan v. U.S. Post Office, 397 U.S. 728 (1970) 28

Sabelko v. City of Phoenix, 120 F.2d 161 (9th Cir. 1997) 20, 22

Schenck v. Pro-Choice Network of Western New York, 519 U.S. 357 (1997) 2, 3, 4, 6, 7, 9, 10, 12, 13, 14, 15, 17, 19, 20, 21, 22, 26, 27, 29

Schneider v. New Jersey, 308 U.S. 147 (1939) 28

Secretary of State v. J.H. Munson Co., 467 U.S. 947 (1984) 21

Shuttlesworth v. City of Birmingham, 394 U.S. 147 (1969) 21

Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975) 21

PAGE

Turner Broadcasting System, Inc. v. FCC, 520 U.S. 180 (1997) 6, 7, 27

United Food and Commercial Workers Int'l Union v. IBP, Inc., 857 F.2d 422 (8th Cir. 1988) 23, 24

United States v. Albertini, 472 U.S. 675 (1985) 7

United States v. Grace, 461 U.S. 171 (1983) 6

Ward v. Rock Against Racism, 491 U.S. 781 (1989) 3, 6, 7, 18, 21, 27

STATUTES

Colo. Rev. Stat. § 18-9-122(1) (1998) 1

Colo. Rev. Stat. § 18-9-122(3) (1998) ..... i, 2

STATEMENT OF THE CASE

Respondents perceive a number of misstatements or omissions in Petitioners' Statement of the Case. As the Colorado courts recognized, this statute was enacted by the Colorado General Assembly for the express purpose of safeguarding access to health care clinics, following a history of obstructive demonstrations outside such clinics.[1] *See* Colo. Rev. Stat. § 18-9-122(1) (1998); R.[2] 620, 631-33, 653-55, 665-67, 673-74, 676, 768-69; *see also* Pet. App. at 7a-10a, 40a, 53a[3]. In addition to direct physical blockades, protesters constructively blockaded clinics by surrounding, crowding, yelling at, grabbing, pushing, shoving, hitting, and spitting on those seeking access, triggering dangerous physiological responses in medical patients. R. 191-97, 224-33, 627, 659-60, 715-20. The Colorado General Assembly acted not out of hostility towards any particular viewpoint, but out of concern about the harmful effects of the aggressive and intimidating physical tactics of some demonstrators. R. 620, 623, 629-30, 673, 696-97, 755-56. Most people perceive the overly-close approaches restricted by the statute as threats or intimidation. R. 195-96, 229-30, 461-65.

The Colorado General Assembly addressed this problem by prohibiting both physically obstructing access and interfering with access through approaching unwilling targets at extremely close quarters in order to force leaflets, signs or speech on them. Petitioners persist in misstating

---

[1] Several legislators had personal experience or had observed televised reports of such obstructive demonstrations. R. 640, 696-97, 762.

[2] References herein are made to the record before the Colorado Supreme Court, indicated as "R. ____."

[3] References to the decisions of the Colorado courts are made to the Petitioners' Appendix, for the Court's convenience.

the operation of the challenged provision, Colo. Rev. Stat. § 18-9-122(3) (hereinafter "the statute"). *See* Pet. at i, 2, 3, 13, 17, 24, 25. It does not ban expressive activity within eight feet of "passersby," as Petitioners assert. Pet. at i. Rather, within 100 feet of the entrance to a health care facility, it prohibits only: (1) "knowingly approaching" another person more closely than eight feet; (2) without the consent of that other person; (3) for the purpose of oral protest, counseling or education, leafleting, or displaying a sign **to that other person**. *See* Pet. App. at 24a.

In evaluating Petitioners' facial challenge[4] to the statute, the Jefferson County District Court and the Colorado Court of Appeals found that the statute was constitutional, applying what this Court has described as "our standard time, place, and manner analysis" for statutes regulating expressive activities. *Schenck v. Pro-Choice Network of Western New York*, 519 U.S. 357, 369 (1997). The trial court specifically found that under this test the statute was narrowly tailored to address "abuses that impede ingress and egress to medical facilities." Pet. App. at 33a. The Colorado Court of Appeals also specifically found that the statute satisfied the standard test, ensuring "safety and unobstructed access" to health care facilities while "depriving protesters of the opportunity to intimidate or make other physical contact with the patients or staff." Pet. App. at 43a.

---

4 The Petitioners have all demonstrated outside health care facilities for a number of years, yet none of them have ever been cited, detained, arrested or referred for prosecution under either the statute or the very similar Denver or Boulder ordinances in effect for over a decade. R. 235-36, 244-45, 253-54. Petitioners Hill and Himmelmann admitted that since passage of the statute, they have continued picketing and oral protest, education and counseling within 100 feet of health care facilities, albeit "with great caution and circumspection." *Id.*

This Court vacated the Colorado Court of Appeals' decision and remanded for reconsideration in light of *Schenck v. Pro-Choice Network of Western New York*, 519 U.S. 357 (1997), which upheld certain provisions of an injunction with similarities to Colorado's statute, and struck down other provisions. On remand, both the Colorado Court of Appeals and the Colorado Supreme Court carefully considered the factors which had rendered part of the *Schenck* injunction invalid, and determined that they were not shared by Colorado's statute.[5] The Colorado Supreme Court accordingly held that the statute was sufficiently narrowly tailored to withstand constitutional scrutiny, as "a valid time, place and manner restriction, a permissible legislative response designed to assure safety and order for citizens entering and leaving Colorado health care facilities." Pet. App. at 29a. Petitioners now seek a second round of review from this court, arguing that *Schenck* requires automatic invalidation of Colorado's statute.

Several of Petitioners' arguments do not appear to have been preserved for review by this Court. The Colorado Supreme Court specifically found that Petitioners had conceded that the reasonable time, place or manner test set forth in *Ward v. Rock Against Racism*, 491 U.S. 781 (1989), was appropriate for the statute at issue here. Pet. App. at 11a. Further, the Court noted that all the Colorado courts had determined that the statute was content-neutral,

---

5 Petitioners did not report all of the reasoning of the Colorado Court of Appeals after remand. Although the Court of Appeals based its decision in part upon the less stringent standard to be applied to statutes, in contrast to the strict standard for injunctions applied in *Schenck*, *see* Pet. at 7, the court also relied on specific differences in this statute's operation that made it more narrowly tailored than the *Schenck* injunction. Pet. App. at 56a.

and that "petitioners do not contend otherwise in this appeal." Pet. App. at 21a. These rulings negate the bulk of Petitioners' arguments.

REASONS FOR DENYING THE WRIT

The decision below is in accord with this Court's precedents. The Colorado Supreme Court appropriately and carefully applied the well-established test this Court has set out for **statutes** regulating the time, place or manner of expressive activity. After a detailed review of the specific operation of the statute at issue, the Colorado courts properly determined that the statute was narrowly tailored, unlike the invalidated injunctive provisions in *Schenck* and *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753 (1994). The statute is content-neutral and is not a prior restraint, under the standards established by this Court.

Contrary to Petitioners' assertions, the decision below is not in conflict with the decision of any other lower court. The decisions of the Eighth and Ninth Circuits and the North Dakota Supreme Court cited in the petition struck down statutory or injunctive provisions which operated differently than the statute here.

The decision below does not present new or important questions of constitutional law. Rather, it correctly applies this Court's precedents, recognizing that obstructive, coercive, and threatening conduct in the course of expressive activity may be regulated by reasonable time, place, and manner restrictions. Contrary to Petitioners' assertion, *see* Pet. at 10, it is their own petition that "squarely conflicts" with this Court's decisions. Accordingly, review by this Court is not warranted.

I. THE COLORADO SUPREME COURT'S DECISION IS IN ACCORD WITH THE DECISIONS OF THIS COURT.

Petitioners' arguments for review primarily turn on disputing the test applicable to the challenged statute. As noted above, Respondents believe that the findings of the Colorado Supreme Court confirm that Petitioners have waived such arguments. *See* Pet. App. at 11a, 21a. In addition, Petitioners' arguments are without credibility, as they omit any acknowledgment of this Court's basic jurisprudence concerning statutory regulations of expressive activity.

A. The Colorado Supreme Court Correctly Applied The Well-Settled Test To Determine The Constitutionality Of Statutes Imposing Time, Place Or Manner Restrictions.

This Court's test for the constitutionality of **statutes** which regulate speech has long been settled, and does not require review:

> Expression, whether oral or written or symbolized by conduct, is subject to reasonable time, place, and manner restrictions. We have often noted that restrictions of this kind are valid provided that they are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant

> governmental interest, and that they leave open ample alternative channels for communication of the information.

Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1984). *See also Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180, 186, 213-14 (1997); *Madsen*, 512 U.S. at 764; *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983); *United States v. Grace*, 461 U.S. 171, 177 (1983); *Frisby v. Schultz*, 487 U.S. 474, 481 (1988); *Ward v. Rock Against Racism*, 491 U.S. at 791. The Colorado Supreme Court applied this test, holding that, "on its face, the statute does no more than place reasonable restrictions on speech that (1) are content-neutral, (2) are narrowly tailored to serve a significant government interest, and (3) leave open ample alternative means for the communication of information petitioners seek to place in the marketplace of ideas." Pet. App. at 3a; *see also* Pet. App. at 29a.

Petitioners' leading argument rests on a supposed conflict with this Court's decisions in *Schenck* and *Madsen*. Pet. at 9-14. Yet the petition nowhere acknowledges that in those decisions this Court was primarily concerned with articulating, explaining, and applying a more rigorous test for speech-regulating **injunctions**, as distinguished from the established test for **statutes** such as Colorado's. "If this were a content-neutral, generally applicable statute, instead of an injunctive order, its constitutionality would be assessed under the standard set forth in *Ward v. Rock Against Racism*. [W]e would determine whether the time, place, and manner regulations were 'narrowly tailored to serve a significant governmental interest.'" *Madsen*, 512 U.S. at 764 (citations omitted).

In contrast, "our standard time, place, and manner analysis **is not sufficiently rigorous** when it comes to evaluating content-neutral **injunctions** that restrict speech." *Schenck*, 519 U.S. at 371, quoting *Madsen*, 512 U.S. at 765 (emphasis added). Therefore, a speech-restrictive injunctive order must be "couched in the narrowest terms that will accomplish [its] pin-pointed objective." *Madsen*, 512 U.S. at 767, quoting *Carroll v. President and Comm'rs of Princess Anne*, 393 U.S. 175, 183 (1968).[6] At oral argument before the Colorado Supreme Court, Petitioners' counsel admitted that the *Ward* test was the appropriate measure of this statute's constitutionality. Pet. App. at 11a. Petitioners' arguments based on *Schenck* and *Madsen* fail to address the stricter test applied in those decisions. Such arguments are contrary to Petitioners' own admission, and do not merit review by this Court.

Unlike Petitioners, the Colorado Supreme Court clearly understood, followed and applied this Court's precedents concerning the applicable tests:

> [U]pon close examination, we cannot conclude that the test applied in *Schenck* is

6 This Court has long held that a statute is narrowly tailored "so long as [it] promotes a substantial government interest that would be achieved less effectively" in its absence. *Ward*, 491 U.S. at 799, quoting *United States v. Albertini*, 472 U.S. 675, 689 (1985). The validity of such statutes "does not turn on a judge's agreement with the responsible decisionmaker concerning the most appropriate method for promoting significant government interests," so long as the statute does not burden substantially more speech than necessary. *Ward*, 491 U.S. at 800, quoting *Albertini*, 472 U.S. at 689. Such statutes cannot be held invalid "simply because there is some imaginable alternative that might be less burdensome on speech." *Ward*, 491 U.S. at 797, quoting *Albertini*, 472 U.S. at 689; *see also Turner Broadcasting System*, 520 U.S. at 217-18.

the appropriate standard by which to determine whether section 18-9-122(3) meets constitutional scrutiny. Our inability . . . is based on an important distinction readily drawn between the two cases in the nature of the government regulation. *Schenck* involved a judicially created preliminary injunction drawn solely for the parties before the Court under the circumstances then existing. Here, to the contrary, section 18-9-122(3) is not the creature of our judiciary, but, instead, is a statute crafted by a coordinate branch of government, and is a rule of general application representing the public policy choices of the General Assembly of the State of Colorado.

As explained by the Supreme Court in *Madsen*, 512 U.S. at 763, one of the differences between judge-drawn injunctions and statutes crafted in the political process is that, "[i]njunctions. . . carry greater risks of censorship and discriminatory application than do general ordinances." As such, the Colorado General Assembly's enactment of section 18-9-122(3), which is . . . intended for general application reaching all citizens, is entitled to greater deference than the judge-made injunction in *Schenck*. See *Madsen*, 512 U.S. at 763 (applying "a somewhat more stringent application of general First Amendment principles" when determining the constitutionality of an injunction). Thus, we conclude that to apply

> the appropriate standard for determining the constitutionality of a content-neutral statute, we rely upon *Ward* and not *Schenck*.

Pet. App. at 18a-19a. On remand, both the Court of Appeals and the Colorado Supreme Court properly re-evaluated whether Colorado's statute was sufficiently narrowly tailored under the less strict test applicable to statutes, while considering the factors discussed in *Schenck*, and determined that the statute survived constitutional scrutiny. The Colorado courts' examination of narrow tailoring rests on no new principles of law and does not require review by this Court.

The petition consistently exaggerates the reach of this narrowly tailored statute, contrary to the authoritative interpretation of the Colorado Supreme Court. *See* Pet. App. at 24a-25a. It represents that under the statute, a demonstrator near health care facilities must seek consent of "passersby" within eight feet before demonstrating. Petition at i. In reality, under the statute the only person who must consent is the individual target of the expressive activity who is **approached** in the course of that activity. *See* Pet App. at 24a-28a. Passersby who are not individually approached cannot invoke the statute.

B. The Decision Below Is Consistent With *Schenck* And *Madsen*.

The Colorado Supreme Court stated specifically that its review was "necessarily informed by the Supreme Court's opinion in *Schenck v. Pro-Choice Network*." Pet. App. at 3a. The court carefully analyzed this Court's ruling

in *Schenck* and scrutinized Colorado's statute for the flaws found in the *Schenck* injunction:

> [I]n *Schenck* the Supreme Court did not strike down all "floating" buffer zones per se, as the petitioners essentially contend. In striking down the floating buffer zones created by the injunction in *Schenck*, the Court recognized that "there may well be other ways to both effect. . . separation and yet provide certainty (so that speech protected by the injunction's terms is not burdened). . . ." 519 U.S. at 378-79. In fact, it was the uncertainty of how to comply with the injunction about which the Supreme Court appeared most concerned. The Court stated that because the protester would have to move with the individual, and because the clinic sidewalks were only seventeen-feet wide, "it would be quite difficult for a protester who wishes to engage in peaceful expressive activities to know how to remain in compliance with the injunction. This lack of certainty leads to a substantial risk that much more speech will be burdened than the injunction by its terms prohibits." *Id.* at 378.

Here, in contrast, the statute is so narrowly drawn that these concerns are alleviated. First, protesters must only maintain a distance of eight feet, not fifteen, which allows for normal conversational tones. Second, where in *Schenck* a protester could

have easily violated the injunction merely by standing still if, for example, an individual approached a protester, then that protester would violate the injunction. Here, in contrast, the mens rea "knowingly" requirement ensures that scenario will not be possible. Even if a protester is approached by an individual, the protester will only violate the statute if, along with the several other requirements of the statute, he or she "knowingly approaches" the individual for the purpose of passing a leaflet or engaging in oral protest. The inadvertent violation, or at least the possibility of such a violation, is substantially avoided by the plain terms of the statute. In *Schenck*, in order to avoid violating the injunction, the protesters were obligated to maintain sufficient separation of fifteen feet at all times. There, the movement of a third party could place the protesters in the position of having violated the injunction. Here, to the contrary, petitioners may actually stand still and though individuals may approach within eight feet of petitioners, the requisite actus reus of "approach[ing]" is not met. **Thus, we do not believe that, even under the *Schenck* test, section 18-9-122(3) burdens more speech than is necessary.**

Pet. App. at 27a-28a (emphasis added). Thus, the Colorado Supreme Court first authoritatively interpreted the operation of the statute -- the job of a state court of last

resort -- and then carefully scrutinized the statute to assure that it was narrowly tailored. Petitioners' arguments implicitly dispute the Colorado Supreme Court's interpretation, seeking to rewrite the statute into one of broader application, in order to bolster their further disagreement with the court over the narrowness of the statute's tailoring. Such sophistry does not merit review.

Further, the petition seizes on one aspect of *Schenck* without consideration of the rest of *Schenck*, which supports the decision below. *Schenck* evaluated the constitutionality of three provisions of an injunction which controlled anti-abortion demonstrations immediately outside clinics. Provisions which were not challenged prohibited "trespassing on, sitting in, blocking, impeding, or obstructing" access; "physically abusing, grabbing, touching, pushing, shoving, or crowding" patients and staff; and the use of sound amplification. 519 U.S. at 366, n. 3. The challenged provisions prohibited:

> (b) demonstrating within fifteen feet from either side or edge of, or in front of, doorways or doorway entrances, parking lot entrances, driveways or driveway entrances of such facilities [the "**fixed buffer zone**"], or within fifteen feet of any person or vehicle seeking access to or leaving such facilities [the "**floating buffer zone**"], except that the form of demonstrating known as sidewalk counseling by no more than two persons as specified in paragraph (c) shall be allowed;

> (c) [S]idewalk counseling consisting of conversation of a non-threatening nature by not more than two people with each person or group of persons they are seeking to counsel shall not be prohibited. Also provided that no one is required to accept or listen to sidewalk counseling, and that if anyone or any group of persons who is sought to be counseled wants to not have counseling, wants to leave, or walk away, they shall have the absolute right to do that, and in such event all persons seeking to counsel that person or group of persons shall cease and desist from such counseling, and shall thereafter be governed by the provisions of paragraph (b) pertaining to not demonstrating within fifteen feet of persons seeking access to or leaving a facility [the "**cease and desist provision**"].

Id.[7] The 15-foot fixed buffer zone passed even the rigorous test for injunctions. Because of the previous history of interference with clinic access, "the only way to ensure access was to move back the demonstrations." *Id.* at 380. This Court declined to "quibble" about the precise distance required, deferring to the district court's

---

[7] The *Schenck* Court summarily disposed of a number of arguments, ruling that these provisions were not a prior restraint, *id.* at 374, n.6; were not content-discriminatory, *id.* at 384-85; and were not vague, *id.* at 383. It also found that the governmental interests underlying the injunction -- "ensuring public safety and order, promoting the free flow of traffic on streets and sidewalks, protecting property rights, and protecting a woman's freedom to seek pregnancy related services" -- were "certainly significant enough to justify an appropriately tailored injunction to secure unimpeded physical access to the clinics." *Id.* at 376 (footnote omitted).

"reasonable assessment of the number of feet necessary" to ensure access. *Id.* at 381. The demonstrators argued that the other unchallenged provisions prohibiting impeding access were all that was necessary, but this Court rejected this argument, finding that it was reasonable to conclude that demonstrators would continue to "aggressively follow and crowd individuals right up to the clinic door and then refuse to move." *Id.* at 381-82. Therefore, the "prophylactic measure" of the additional space created by the fixed buffer zone was appropriate. *Id.* at 382.

The operation of the cease and desist provision within the fixed buffer zone did not detract from *Schenck's* conclusion. This Court noted that the District Court's decision to allow two sidewalk counselors inside the buffer zones was clearly "an effort to bend over backwards" to accommodate expression. *Id.* At 381, n. 11. Because the District Court was entitled to conclude on the record that the only feasible way to protect access would have been to keep the entire buffer zone completely clear, "the District Court's extra effort to enhance defendants' speech rights by allowing an exception to the fixed buffer zone should not redound to the detriment of respondents." *Id.*

Colorado's statute operates similarly to the fixed buffer zone *Schenck* upheld. Although the statute's 100-foot fixed buffer zone is larger than *Schenck's* 15-foot fixed buffer zone, it also allows far more activity within it. Instead of only two sidewalk counselors who must immediately withdraw outside the fixed buffer zone if **anyone** requires them to, Colorado's statute allows an unlimited number of demonstrators within the buffer zone,

who must stop their approach only at eight feet, and only if their target audience does not consent. Like the injunction in *Schenck*, the statute rests on the reasonable assumption that without such a prophylactic measure, demonstrators would continue to crowd people right up to clinic doors, effectively impeding access.[8] In addition, Colorado's statute applies only to a **knowing approach**. Therefore, unlike *Schenck*, a successful prosecution could not be based upon an inadvertent violation.[9] A demonstrator is not required to back up from an approaching person, but simply stand still and refrain from lunging at the target of his speech. These carefully tailored provisions control crowding and threatening, like the fixed buffer zone with the cease and desist provision upheld in *Schenck*, without creating the "substantial risk of burdening more speech than [its] terms prohibit," *see* 519 U.S. at 378, which invalidated the *Schenck* 15-foot floating buffer zone.

The petition also argues that the decision below is inconsistent with *Madsen*, where this Court invalidated an injunctive provision supposedly "substantially similar" to the statute at issue here. Pet. at 12. In reality, the injunctive provision struck down was far broader than Colorado's statute and, as noted above, was analyzed under a stricter test. Further, *Madsen* upheld a method of preserving access to health care more restrictive than the statute here, imposing a 36-foot "speech-free buffer zone" around a medical clinic. 512 U.S. at 768-770. Therefore, *Madsen's*

---

8 *See* R. 674: "Eight feet is far enough so that you can't get up into someone's face and stop them from moving." (Statement of sponsor.) *See also* R. 224, 232, 718-20.

9 Petitioners conceded at oral argument that inadvertent violations of the statute caused by a third party were not a legitimate threat. *See* Pet. App. at 25a.

reasoning could support an eight-foot "speech-free buffer zone" around patients near health care facilities. The decision below, approving an even less restrictive alternative that allows speech within the buffer zone with a willing listener, is even more clearly consistent with *Madsen*.

Petitioners focus on a different provision of the injunction in *Madsen*, which prohibited "physically approaching any person seeking the services of the Clinic unless such person indicates a desire to communicate," in an area within 300 feet of the Clinic. *Id.* at 760. This provision included no proximity requirement for the prohibited "approach" within the 300-foot zone, so that a demonstrator who took one step towards a patient across the street from him would be in violation. Further, access to the clinic was already protected by other provisions of the injunction, including the 36-foot speech-free buffer zone. Thus, under the more stringent standard imposed on an injunction, this Court found that the provision burdened "more speech than is necessary to prevent intimidation and to ensure access to the clinic," improperly preventing all approaches "regardless of how peaceful the contact may be." *Id.* at 774.

Colorado's statute, however, applies only within eight feet -- the last two or three steps before physical contact occurs. A focused, targeted approach by a stranger shouting slogans at a distance closer than eight feet is experienced by most people as "so infused with violence as to be indistinguishable from a threat of physical harm." *Id.*; *see* R. at 195-96, 229-230. Thus, because both the facts and the legal standard concerning the *Madsen* "no-approach"

provision were different, the decision below does not conflict with *Madsen*.

Petitioners essentially argue that *Madsen's* invalidation of the no-approach provision mandates that any and all consent requirements be struck down. This argument is contrary to *Schenck*. The petitioners in *Schenck*[10] argued that *Madsen's* disapproval of the 300-foot "no-approach zone" required disapproval of *Schenck's* consent-based "cease and desist" provision. The *Schenck* Court, however, upheld the cease and desist provision, remarking that the broad no-approach zone in *Madsen* was "easily distinguishable." 519 U.S. at 384, n.12. Colorado's narrowly tailored statute is likewise easily distinguishable from *Madsen's* broad no-approach zone, applying only within a narrow, precisely defined zone to obstructive and threatening approaches.

Because the statute's provisions are narrowly drawn, they would pass constitutional muster even under the more rigorous test for injunctions articulated in *Schenck* and *Madsen*. Accordingly, the Colorado Supreme Court properly determined that the statute was constitutional under the standard test for statutes.

C. The Statute Is Content-Neutral.

Petitioners argue that the Colorado Supreme Court should have applied strict scrutiny because they believe the statute is content- or viewpoint-based. Pet. at 15-16. As noted above, Respondents believe that this argument has not been properly preserved for review. The Colorado Supreme

---

10 Represented by counsel who are representing Petitioners here.

Court found that the statue was content-neutral and stated that, "the petitioners do not contend otherwise in this appeal." Pet. App. at 21a. In any case, the argument is based on a definition of content-neutrality not found in this Court's precedents and is directly contradicted by *Schenck* and *Madsen*; accordingly, it does not merit this Court's review.

The applicable standard for determining content neutrality is well-established:

> The principle inquiry in determining content neutrality. . . is whether the government has adopted a regulation of speech because of disagreement with the message it conveys. The government's purpose is the controlling consideration. A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others. Government regulation of expressive activity is content neutral so long as it is justified without reference to the content of the regulated speech.

Ward, 491 U.S. at 791 (citations and quotation marks omitted); *see also Madsen*, 512 U.S. at 763. The statute here meets that test. Like the injunctions held content-neutral in *Schenck* and *Madsen*, it is directed at harmful **conduct** by demonstrators, regardless of their viewpoint. *Schenck*, 519 U.S. at 384-85; *Madsen*, 512 U.S. at 762-64. It is not the content of "passing a leaflet or handbill," "displaying a sign," or "engaging in oral protest, education,

or counseling" but the threatening and intimidating close **approach** while engaging in these expressive activities which is prohibited.

Petitioners apparently do not dispute that the leafleting and sign provisions are content-neutral, but assert that the statute's reference to "oral protest, education, or counseling" is improperly content-based. Pet. at 15. This argument is inconsistent with the cases cited by Petitioners, which discuss either viewpoint or subject matter discrimination. As authoritatively construed by the Colorado Supreme Court, the statute's restrictions "apply equally to all demonstrators, regardless of viewpoint, and the statutory language makes no reference to the content of the speech." Pet. App. at 22a. Contrast this with *R.A.V. v. City of St. Paul*, 505 U.S. 377, 392 (1992), striking down a "bias-motivated crime" ordinance that expressly applied to only one side of a debate. Further, the statute does not apply to only speech on a particular topic, such as labor, *see Police Department of Chicago v. Mosley*, 408 U.S. 92, 95 (1972); *Carey v. Brown*, 447 U.S. 455, 461 (1980), or politics, *see Boos v. Barry*, 485 U.S. 312, 318-19 (1988); *Burson v. Freeman*, 504 U.S. 191, 197 (1992).

Petitioners also allege that because individuals who are approached by demonstrators may withhold their consent for closer approaches, the statute hinges on improper, content-based "audience reaction." Pet. at 15. This argument is not supported by this Court's decisions. An improper "heckler's veto," where a hostile mob attempts to force a speaker out of an entire forum, *cf. Forsyth County v. Nationalist Movement*, 505 U.S. 123 (1992), is not analogous to allowing a medical patient to keep an aggressive demonstrator at arm's length.

Petitioners' arguments that the statute is both content- and viewpoint-discriminatory are contrary to the very decisions they rely upon. In *Schenck*, this Court rejected a very similar argument that the consent-based cease and desist provision was content-discriminatory, holding that the injunction was addressed only to the **conduct** of demonstrators, and they remained free to espouse their message outside the buffer zones. 519 U.S. at 384-85; *see also Madsen*, 512 U.S. at 762-64.[11] Similarly, the statute here addresses conduct and leaves demonstrators free to espouse their message.

Finally, the record clearly demonstrates the statute's content-neutrality. As the bill's sponsor expressly stated: "We're not telling people what they can say. They can say anything that, that they want." R. 698. During the floor debate another representative explained the statute: "I don't care what side you're on. If you're pro or con, stay back eight feet." R. 699. The court below followed this Court's precedents in determining that the statute is content-neutral.

D. The Decision Below Merely Applies A Long-Settled Definition Of Prior Restraint.

Petitioners assert that the statute is an invalid prior restraint. Pet. at 17. Because Petitioners agreed at oral argument before the Colorado Supreme Court that the

11 In *Sabelko v. City of Phoenix*, 120 F.2d 161 (9th Cir. 1997), which Petitioners have also cited in their petition as supposedly in conflict with the Colorado Supreme Court's decision, the Ninth Circuit found that the challenged ordinance, which described the conduct it regulated in words almost identical to those in Colorado's statute, was content-neutral. 120 F.3d at 164.

Ward test (a different test from that applicable to prior restraints) was the appropriate test for the statute, *see* Pet. App. at 11a, this issue is not properly before the Court. In any case, *Schenck* and *Madsen* squarely answer this argument, holding that there is no prior restraint if "alternative channels of communication [are] left open," 519 U.S. at 374, n.6, and demonstrators "are not prevented from expressing their message in any one of several different ways; they are simply prevented from expressing it within [an appropriate] buffer zone." *Madsen*, 512 U.S. at 763, n.2. Under the statute here demonstrators may express their messages in any one of a number of ways; they are simply prohibited from expressing them by approaching unconsenting targets within the eight-foot bubble. The statute is not a prior restraint.

The petition simply ignores this Court's definition of prior restraints as regulations that give "**public officials** the power to deny use of a forum in advance of actual expression." *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 553 (1975) (emphasis added).[12] A statute creating a limited buffer zone to allow medical patients to escape obstructive, in-your-face harangues is simply not analogous to the actions of a government censor denying access to an entire forum. It is a "fundamental tenet of our

12 *See also Riley v. National Federation of the Blind, Inc.* 487 U.S. 781, 802 n.14 (1988) ("Secretary of State has unbridled discretion"); *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 763 (1988) ("unbridled discretion of a government official"); *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 225 (1990) (same); *Secretary of State v. J.H. Munson Co.*, 467 U.S. 947, 964 n. 12 (1984) ("unguided discretion of the Secretary of State"); *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 153 (1969) ("licensing officials" had unbridled discretion); *Freedman v. Maryland*, 380 U.S. 51, 56 (1965) ("overly broad licensing discretion to an administrative office"); *Cox v. Louisiana*, 379 U.S. 536, 557 (1965) ("such broad discretion in a public official").

Constitution. . . that the government is subject to constraints which private persons are not," *ISKCON v. Lee*, 505 U.S. 672, 696 (1992) (Kennedy, J. concurring). Petitioners have not cited a single authority applying the prior restraint doctrine to the decisions of private individuals. It is Petitioners who seek to make new law, outside the precedents of this court. Such arguments do not require review.

II. THE STATUTE IS CONSISTENT WITH DECISIONS OF OTHER STATE COURTS OF LAST RESORT AND FEDERAL CIRCUIT COURTS.

A. The Ninth Circuit Evaluated A City Ordinance That Operated Differently Than The Statute Here.

In *Sabelko v. City of Phoenix*, 120 F.3d 161 (9th Cir. 1997), the Ninth Circuit Court of Appeals invalidated an ordinance that shared virtually all the uncertainties that led to the invalidation of the floating buffer zone in *Schenck*. The Phoenix floating buffer zone applied to many individuals at once, requiring a demonstrator to constantly monitor his or her distance and creating a high amount of uncertainty. 120 F.3d at 165. There is nothing in the Ninth Circuit's opinion, however, which suggests that the court sweepingly "rejected the legislative imposition of floating bubble zones," as Petitioners allege. Pet. at 22. Rather, the court evaluated a specific floating buffer zone and determined that it "lack[ed] the narrow tailoring necessary to survive our scrutiny." 120 F.3d at 165.

Thus the Colorado Supreme Court's decision is not in conflict with *Sabelko*, because the statute here operates

differently than the Phoenix ordinance. As the Colorado Supreme Court explained, Colorado's statute does not create the unnecessarily speech-chilling uncertainty of the Phoenix ordinance, because a violation both requires an affirmative "approach" by the demonstrator and hinges on the "knowing" intent of the demonstrator. Pet. App. at 20a-21a, 25a. A demonstrator cannot violate the statute inadvertently, but only through intentional actions under the demonstrator's control. Courts are not in conflict when they reach differing results in evaluating differing legislative enactments.

B. The Eighth Circuit And The North Dakota Supreme Court Evaluated Provisions With No Similarity To The Statute At Issue Here.

Petitioners assert that the decision below conflicts with *United Food and Commercial Workers Int'l Union v. IBP, Inc.*, 857 F.2d 422 (8th Cir. 1988), and *Fargo Women's Health Organization, Inc. v. Lambs of Christ*, 488 N.W.2d 401 (N.D. 1992). Pet. at 22-24. Those decisions, however, invalidated far broader restrictions on speech, with little relation to the challenged statute in this case, under more stringent standards, and thus their holdings are not in conflict with the decision below.

In *IBP*, the Eighth Circuit addressed the constitutionality of a Nebraska labor picketing statute, which prohibited, among other activities:

> Using threatening language toward [another] person or any member of his or her immediate family, or in his, her or their

> presence or hearing, for the purpose of inducing or influencing, or attempting to induce or influence, such person to quit his or her employment, or to refrain from seeking or freely entering into employment, or by persisting in talking to or communicating in any manner with such person or members of his or her immediate family against his, her or their will, for such purpose.

857 F.2d at 425 n.4. Thus the statute imposed an unlimited ban on speech, with no place restrictions, and was expressly content-discriminatory. *See Boos v. Barry*, 485 U.S. at 321 (such regulations subject to exacting scrutiny). Contrary to Petitioners' assertions, the statute was not defended on the grounds that "unwelcome words are unprotected," Pet. at 23, but that it applied only to "fighting words." *Id.* at 433. The Eighth Circuit declined to so drastically rewrite the statute, and so agreed with the district court that the provision was improperly content-based. *Id.* at 424, 435. Nothing in the circuit court's analysis in *IBP* is concerned with the constitutionality of a narrow place restriction like that in the statute here.

In *Fargo Women's Health*, the North Dakota Supreme Court considered the constitutionality of an injunction restricting protests outside an abortion clinic. The court upheld most of the injunction, but struck down a provision which prohibited "speaking to staff and patients of [the clinic] who indicate that they do not wish to be spoken to." 488 N.W.2d at 407 n.1. The court's entire analysis was contained in one sentence: "However, 'speaking' to staff and patients cannot be constitutionally enjoined." *Id.* at 411. The injunction also prohibited

"distributing leaflets or brochures to any person who has indicated orally or by gesture that such person does not wish to receive such literature." *Id.* at 407 n.1. Again, the court struck this down with a one-sentence analysis: "Obviously, distributing literature is protected communicative activity and a complete ban violates the First Amendment." *Id.* at 411.

The injunctive provisions stricken in *Fargo Women's Health* contained no place limitations whatsoever, unlike the statute here. Further, in the same decision the North Dakota Supreme Court upheld a prohibition against "harassing" or "intimidating" patients and staff, *id.* at 410-11; following a remand for more factual findings, it also upheld a provision of the injunction which excluded all but two peaceful picketers from a "protected zone" extending 100 feet from the clinic property line. *Fargo Women's Health Organization, Inc. v. Lambs of Christ*, 502 N.W.2d 536, 538 (N.D. 1993). Thus, the decisions of the North Dakota Supreme Court are consistent with the narrow eight-foot restriction upheld below.

The decision below is in fact consistent with many other decisions of the courts of appeals and state courts of last resort, upholding various buffer zones as necessary to protect access to clinics and to protect patients from undue stress. *See, e.g., Planned Parenthood Shasta-Diablo, Inc. v. Williams*, 898 P.2d 402 (Cal. 1995), *cert. denied*, 520 U.S. 1133 (1997) (upholding injunction which placed demonstrators more than 60 feet from clinic sidewalk, across a busy four-lane street); *Portland Feminist Women's Health Center v. Advocates for Life, Inc.*, 859 F.2d 681 (9th Cir. 1988) (upholding 25 foot "free zone"); *Hirsh v. City of Atlanta*, 401 S.E.2d 530 (Ga.), *cert. denied*, 501 U.S. 1221

and 502 U.S. 818 (1991) (upholding injunction imposing five-foot bubble within 50 feet of clinic property), *Bering v. SHARE*, 721 P.2d 918 (Wash. 1986), *cert. dismissed*, 479 U.S. 1050 (1987) (upholding injunction which placed demonstrators around the corner from clinic entrance). There is no conflict between the decision below and decisions of other courts which would necessitate review by this Court.

III. THE DECISION BELOW PRESENTS NO NEW OR IMPORTANT QUESTIONS OF CONSTITUTIONAL LAW.

Petitioners argue that this case presents important principles of constitutional law needing resolution by this Court. Pet. at 24-26. In reality, Petitioners seek review of a statute and a decision which simply applied previous precedents of this Court. Further, Petitioners rely on exaggerated statements of the statute's sweep, contrary to the definitive interpretation of the Colorado Supreme Court.

Petitioners attack the statute because it does not protect access by prohibiting obstructions, trespass, assaults or threats, arguing that Colorado's "true interest" is "suppressing free speech." Pet. at 25. The record below shows that the Colorado General Assembly was not seeking to suppress speech, but to protect health care access. R. 620-21, 673-74, 683-84, 698-700. As discussed above, the statute specifically targets obstructive and threatening conduct combined with speech. The Colorado General Assembly determined that, in addition to prohibitions against physical obstructions, assaults, and the like, an additional "prophylactic measure," *see Schenck*, 519 U.S. at

382, or "buffer zone, " *see Madsen*, 512 U.S. at 770, was necessary to preserve unfettered access to health care facilities. Although Petitioners might write a different statute, their disagreement with the reasonable means chosen by the Colorado General Assembly is not sufficient reason for this Court's review. *See Ward*, 491 U.S. at 800; *Turner Broadcasting System*, 520 U.S. at 193-194, 211-12.

The Colorado courts applied the well-settled test for statutes, which the petition neglects to even recognize.[13] The statute was carefully scrutinized for any of the infirmities which invalidated the *Schenck* injunctive floating buffer zone, and none were found. As noted above, buffer zones previously approved by this Court are a more restrictive means of preserving access to health care. There is no need to review Colorado's decision to employ an even narrower restriction, which prohibits unconsented approaches that are tantamount to threats, while preserving the ability to "reach the minds of willing listeners." *See Kovacs v. Cooper*, 336 U.S. 77, 87 (1949).

The statute at issue will not prohibit parades, or create broad "audience veto" powers. *See* Pet. at 25. It will, however, prevent coercive blockades. This is consistent with this Court's decisions, which have long recognized that, "A group of demonstrators could not insist upon the right to cordon off a street, or entrance to a public or private building, and allow no one to pass who did not agree to listen to their exhortations." *Cox v. Louisiana*, 379 U.S. 536, 555 (1965). Demonstrators may not "insist upon a

---

13 Petitioners go so far as to imply that injunctions should be evaluated under a less stringent standard than statutes, Pet. at 26, an argument definitively rejected by *Madsen*, 512 U.S. at 766-67.

constitutional right to form a cordon across the street and allow no pedestrian to pass who did not accept a tendered leaflet." *Schneider v. New Jersey*, 308 U.S. 147, 160 (1939). There is "a substantial and justifiable" state interest in regulating speech "directed primarily at those who are presumptively unwilling to receive it." *Frisby v. Schultz*, 487 U.S. at 488.

The use of a consent requirement to balance competing rights is in accord with this Court's decisions. *Rowan v. U.S. Post Office*, 397 U.S. 728 (1970), upheld a statute which allowed an individual to invoke the power of the Post Office to prohibit delivery of mail which the individual found offensive, noting that leaving the decision to the individual avoided "constitutional questions that might arise from vesting the power to make any discretionary evaluation of the material in a government official." 397 U.S. at 737.

Consistent with this Court's pronouncements, the decision below recognizes that those outside health care facilities must still "tolerate insulting, and even outrageous, speech," *see Madsen*, 512 U.S. at 774, but from eight feet away, decreasing obstructions and threats without cutting off communication. The statute is fully consistent with the law of this Court:

> For the right to communicate is not limitless. Even peaceful picketing may be prohibited when it interferes with the operation of vital governmental facilities. . . . Moreover, we have often declared that "[a] state or municipality may protect individual privacy by enacting reasonable time, place, and manner regulations applicable to all speech *irrespective of content*." In sum, "no mandate in our Constitution leaves States and governmental units powerless to pass laws to protect the public from the kind of boisterous and threatening conduct that disturbs the tranquillity of spots selected by the people either for homes. . . or for public and other buildings that require peace and quiet to carry out their functions, such as courts, libraries, schools, and hospitals."

Carey v. Brown, 447 U.S. 455, 470-71 (1980) (citations omitted). Colorado's statute is a legitimate exercise of the state's authority to restrict threatening conduct immediately outside health care facilities. The Colorado Supreme Court properly evaluated and upheld the statute after applying the well-settled test for such statutes and scrutinizing it for the flaws found in the *Schenck* injunction. There is nothing in the decision below that requires review.

CONCLUSION

The petition should be denied.

Respectfully submitted,

KEN SALAZAR
Attorney General
MICHAEL E. McLACHLAN
Solicitor General
FELICITY HANNAY
Deputy Attorney General
CAROL D. ANGEL*
Senior Assistant Attorney General
Natural Resources and

ROGER W. NOONAN
MAUREEN HERR JURAN
GORSUCH KIRGIS LLP
1515 Arapahoe Street
Suite 1000
Denver, Colorado 80202
Telephone: (303) 376-5000
Attorneys for City of Lakewood

Environment Section
Attorneys for Ken Salazar and
State of Colorado
1525 Sherman Street, 5th Fl.
Denver, Colorado 80203
Telephone: (303) 866-5016
FAX: (303) 866-3558
Counsel of Record